

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAMES A. MURPHY,
Plaintiff,

v.

J. B. HUNT TRANSPORT SERVICES, INC.,
and DOES 1 through 10, inclusive,
Defendants.

No. CV 10-01568 WHA

**ORDER DENYING
DEFENDANT'S MOTION TO
DISMISS AND VACATING
HEARING**

INTRODUCTION

Defendant J. B. Hunt Transport Services, Inc., moves pursuant to FRCP 12(b)(6) to dismiss the fourth claim made against it by plaintiff James A. Murphy. The fourth claim involves the nonpayment of wages for regular meal and rest periods to which plaintiff asserts an entitlement upon termination. Defendant seeks to dismiss the claim because it would be duplicative of a stayed class action suit brought against it in the Central District of California. This order holds that plaintiff's claim would not be duplicative of the class action suit, because plaintiff has promised to opt out of that suit when permitted to do so. For the reasons stated below, defendant's motion to dismiss is **DENIED**.

STATEMENT

Plaintiff James A. Murphy alleges that he was an employee of J. B. Hunt Transport Services Inc. until March 2009, when he was terminated. In state court plaintiff sued for

1 discrimination on the basis of his actual or perceived disability and for compensation for his
2 regular meal and rest periods. Defendant removed the action. Plaintiff's fourth claim charges
3 that defendant failed to provide him with the required rest and meal periods in violation of the
4 California Labor Code and failed to adequately compensate him for any owed payments upon his
5 termination.

6 *Ortega v. J. B. Hunt Transport, Inc.*, Case No. 2:07-cv-08336 FMC-JCx, is pending as a
7 certified class action suit in the Central District of California. Claims against the same defendant
8 are based on violations of the California Labor Code pertaining to the provision and lack of
9 compensation for meal and rest periods. Before notice was given to class members, the
10 proceedings were stayed to wait for the California Supreme Court's decision on *Brinker*
11 *Restaurant Corp. v. Superior Court*, 196 P.3d 216 (Oct. 22, 2008).

12 Defendant moves to dismiss the fourth claim or alternatively seeks to stay this case
13 pending the resolution of the *Ortega* case. Both parties recognize that plaintiff will qualify as a
14 member of the class in the *Ortega* suit but has yet to be given notice of this status. Plaintiff has
15 brought the meal and rest claims in conjunction with claims of employment disability
16 discrimination. In contention, defendant asserts that plaintiff's fourth claim is duplicative of
17 those brought by the *Ortega* class representatives and that hearing it would be a waste of judicial
18 resources. Furthermore, defendant asserts that plaintiff's awareness of the *Ortega* suit and his
19 qualification as a class member binds him to the *Ortega* class until he is given the legal
20 opportunity to opt out. On May 18, 2010, however, plaintiff submitted a sworn declaration herein
21 certifying that he will opt out of the *Ortega* class action suit as soon as given the opportunity.

22 ANALYSIS

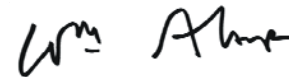
23 Because plaintiff will opt out of *Ortega*, there is no point in a dismissal or a stay. Plaintiff
24 will not be bound by the judgment there. Plus, there are other claims here that have nothing to do
25 with *Ortega*. Plaintiff has an individual case, and is not proposing any kind of class competition
26 with *Ortega*. It is time to get our own case moving. There is no occasion for delay.

CONCLUSION

For the foregoing reasons, defendant's motion to dismiss the fourth claim is **DENIED**. The hearing on the motion is **VACATED**.

IT IS SO ORDERED.

Dated: May 25, 2010.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE